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In the Supreme Court of the United States

OCTOBER TERM, 1982

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In our petition we explain that the court of appeals' decision, interpreting the term "stationary source" in the new source review provisions of the Clean Air Act, represents a significant breach of established limits on the scope of judicial review of administrative action. We also show that the decision is inconsistent with the congressional design vesting the States with substantial discretion to determine what mix of nonattainment program strategies best serves their needs while assuring that the required degree of pollution abatement will be achieved. The court of appeals acknowledged (82-1005 Pet. App. A8, A9 n.22, A17 n.39) its decision was unsupported by pertinent statutory language or legislative history. The only basis for its decision thus was its own conclusion that treating each emission-producing unit as a separate source would be most compatible with the overall air quality improvement objectives of the nonattainment program (*id.* at A17 to A18).

Remarkably, respondents make no serious effort to defend the court of appeals' analysis in this case. Rather, they assert the following alternative rationales: (1) the pertinent statutory language bars the Administrator from approving any state implementation plan using a plant-wide approach to new source review for nonattainment areas (Br. in Opp. 15-16), and (2) the legislative history of the 1977 Amendments to the Clear Air Act demonstrates that Congress intended that each unit be treated as a stationary source (Br. in Opp. 16-21).

1. Respondents claim (Br. in Opp. 10, 15-16) that the 1977 Clean Air Act Amendments *do* "determine" (Br. in Opp. 10) the meaning of the term "stationary source" employed in Section 172(b)(6) of the Act, 42 U.S.C. (Supp. IV) 7502(b)(6), which establishes the new source review requirement. But the definition respondents point to (Br. in Opp. 15), Section 111(a)(3) of the Act, 42 U.S.C. (Supp. IV) 7411(a)(3),[1] explicitly provides that it is effective only "[f]or purposes of *this section*" (emphasis added). "[T]his Section" — Section 111—establishes the new source performance standards ("NSPS") program; it has no application to the nonattainment program or its component new source review requirement. The NSPS program is applicable to new sources without regard to the air quality of the region in which a source is located, and was enacted in 1970. See 42 U.S.C. 1857c-6. Accordingly, the Section 111 NSPS definition of "stationary source" simply is not controlling for purposes of the nonattainment program established in 1977 to cover selected regions of the nation.[2]

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[1]Section 111, 42 U.S.C. (Supp. IV) 7411 provides in pertinent part:

> (a) For purposes of this section
>
> * * * * *
>
> (3) The term "stationary source" means any building, structure, facility or installation which emits or may emit any air pollution.

[2]The decisions of the Fourth and Ninth Circuits cited by respondents (Br. in Opp. 5-6 & n.10) concern the NSPS program rather than the nonattainment program, and were, as respondents concede, controlled by the D.C. Circuit's decision in *ASARCO Inc.* v. *EPA*, 578 F.2d 319 (1978). They do not address the issue in this case.

Significantly, in establishing the nonattainment program in 1977 Congress did adopt by reference the NSPS program definition of the terms "modification" and "modified" that are also used in the new source review program. See Section 171(4), 42 U.S.C. (Supp. IV) 7501(4), incorporating by reference Section 111(a)(4), 42 U.S.C. (Supp. IV) 7411(a)(4). By contrast, the 1977 Congress did not adopt the NSPS definition for the term "stationary source"; nor did it prescribe a separate definition (see pages 4-7, *infra*).[3] Nor is the term "stationary source" to be found among the phrases defined for purposes of the Clean Air Act as a whole in Section 302, 42 U.S.C. (Supp. IV) 7602. Respondents' assertion that Congress has defined the term in a manner that deprives the Administrator of discretion to promulgate regulations offering the States the option of employing a plant-wide approach to new source review is thus simply incorrect.[4] Respondents' contention that Congress prescribed a definition for the term at issue here is in fact diametrically opposed to the court of appeals' conclusion

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[3]In Section 171, 42 U.S.C. (Supp. IV) 7501, Congress did define several other terms of art used in the statutory provisions governing the nonattainment program.

[4]Respondents have recast the question presented and framed much of their discussion as though the Administrator had required the States to adopt a plant-wide approach to new source review. See *e.g.* Br. in Opp. i, 24-26. As explained in the petition (at 17) the use of a plant-wide approach to new source review instead of the more intrusive equipment unit-specific approach preferred by respondents is merely an option made available to the States. Moreover, this option is available only to those States that can show that their SIPs embracing it provide for the required amelioration of air quality.

Respondents also err in suggesting (Pet. 9, 15) that the regulations invalidated by the court of appeals represent a departure from long-standing practice. As explained in our petition (at 7) the rules that were replaced by those under review in this case themselves represented a change of the agency's original position on this issue. Because there could have been no occasion for the agency to formulate any position on the proper interpretation of the 1977 Act before 1977, respondents' suggestion (Br. in Opp. 9) that the unit-specific definition had been in place since 1971 is simply inaccurate.

that "Congress * * * supplied none" (82-1005 Pet. App. A9 n.22).[5]

2. Reviving another contention rejected below, respondents argue here (Br. in Opp. 16-21) that the legislative history of the 1977 Clean Air Act Amendments dictates that new source review be conducted on a unit-specific (rather than a plant-wide) basis. As noted, the court of appeals was persuaded to the contrary that " 'the legislative history is at best contradictory' " (82-1005 Pet. App. A17 n.39, quoting government's brief). In fact, the convoluted legislative history of the new source review requirement, compiled during the course of two different Congresses, does not directly address the question presented here and does not support the court of appeals' judgment.

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[5]The court of appeals did suggest (82-1005 Pet. App. A9 n.22), following its analysis in *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 395-396 (D.C. Cir. 1979), that in the absence of any statutory definition it was appropriate to look to the NSPS definition, Section 111(a)(3). But, as in *Alabama Power* itself, the court's observation was made subject to the caveat that

> EPA * * * has authority to define the constituent terms of source enumerated in [Section 111(a)(3)] ("building, structure, facility or installation") in a manner that will best effectuate "the expressed purposes of the Act."

82-1005 Pet. App. A9 n.22, quoting *Alabama Power Co.* v. *Costle*, *supra*, 636 F.2d at 396. Indeed, that is precisely what the agency has done. The term "stationary source" is defined in the new source review program regulations using the language of Section 111(a)(3), while the constituent components of that definition are themselves defined so as to authorize a plant-wide approach to new source review. 40 C.F.R. 51.18(j)(1)(i) and (ii); see also 40 C.F.R. 52.24(f)(1) and (2).

In this case the court of appeals correctly recognized that reference to Section 111(a)(3) cannot obviate or alter the basic inquiry: to determine the contours of the new source review program established in Section 172(b)(6) by Congress. Regrettably, the court of appeals failed to appreciate that because Congress nowhere expressed any intention to limit the Administrator's discretion to frame the necessary definition, its decision necessarily substitutes a judicial conception of what the public interest requires for the Administrator's judgment.

A critical link in respondents' argument is the 1977 Senate version of a bill to amend the Clean Air Act (see Br. in Opp. 16-17, 20-21). Respondents assert that the Senate in 1977 contemplated unit-by-unit new source review. Assuming that this is correct,[6] the strongest evidence for it in any event is the fact that the Senate bill adopted the NSPS definition of the term "stationary source" for all purposes under the Act (see pages 2-4, *supra*).[7] However, as previously noted, Congress ultimately chose not to make that definition applicable to the new source review requirement. Accordingly, any inferences that might be drawn about the Senate's intent in 1977 provide no insight into the meaning of the final legislation.

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[6]Such an assumption is not necessarily warranted. Respondents' description of the 1977 Senate bill and its legislative history is incomplete, and therefore misleading. The particular new source review requirements of the 1977 Senate bill (derived from the 1976 Senate bill) that are described by respondents were merely an interim measure, to be applied prior to July 1, 1979. See S. 252, 95th Cong., 1st Sess. § 13(a) (1977), adding Section 113(g)(1) to the Act, *reprinted in* Staff of Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., [3] *A Legislative History of the Clean Air Act Amendments of 1977* at 630-634 (Comm. Print 1978) (hereinafter "*Leg. Hist.*"); S. Rep. No. 95-127, 95th Cong., 1st Sess. 54-56 (1977), *reprinted in* 3 *Leg. Hist.* at 1428-1430. The Senate adopted a different approach to be applied after that date, permitting construction of new or modified facilities in nonattainment areas providing that the State had in effect an approved revised implementation plan formulated in response to the amendments. In order to secure approval for such a revised SIP, a State would have been required to demonstrate, *inter alia*, that it provided for attainment of the mandated national air quality standards by the end of 1982, required major new or modified facilities to employ state-of-the-art emissions control technology, and provided for sufficient emission reductions from existing sources by 1982 to compensate for added emissions from new facilities and permit timely attainment of applicable air quality standards. S. 252, *supra*, § 13(b), amending Section 110(a)(3)(A)(iii) of the Act, *reprinted in* 3 *Leg. Hist.* at 635-636; S. Rep. No. 95-127, *supra*, *reprinted in* 3 *Leg. Hist.* at 1428-1430. Accordingly, the bearing of the legislative history respondents discuss upon the scope of new source review intended to be required by the Senate after 1979 is far from clear.

[7]S. 252, *supra*, § 39, adding Sections 302(k) and (m) to the Act, *reprinted in* 3 *Leg. Hist.* at 684-686.

Indeed, the new source review requirements of the Clean Air Act Amendments of 1977 as they emerged from the Conference Committee were derived primarily from the *House bill*, rather than the Senate bill. The House bill called for revised SIPs providing for attainment of air quality standards by 1982 (with extensions of that date to 1987 available for certain pollutants) and reasonable further progress in the interim; it also required establishment of a permit program to govern construction and operation of "new or modified stationary sources" similar to the new source review requirement ultimately enacted.[8] The House bill did not define the term "stationary source"; and we are unaware of any indication in the bill or its legislative history—and respondents have cited none—that this new source review program was to be applied to each unit of process equipment rather than on a plant-wide basis.

The new source review provisions of the bill that emerged from the Conference Committee are primarily derived from the 1977 House bill.[9] Like the House bill, but unlike the

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[8]H.R. 6161, 95th Cong., 1st Sess. § 117 (1977), adding Section 127(c)(2), (3) and (8) and (d), *reprinted in* 4 *Leg. Hist.* at 2332, 2333, 2335-2339; H. R. Rep. No. 95-294, 95th Cong., 1st Sess. 13-14 (1977), *reprinted in* 4 *Leg. Hist.* at 2480-2481.

In lieu of the interim new source review provisions adopted by the Senate (see page 5 note 6, *supra*) the House bill continued in effect on a temporary basis EPA's Offset Ruling, 41 Fed. Reg. 55524 (1976). H.R. 6161, *supra*, § 117, adding Section 127(b)(2) to the Act, *reprinted in* 4 *Leg. Hist.* at 2331-2332; H.R. Rep. No. 95-294, *supra*, at 14, *reprinted in* 4 *Leg. Hist.* at 2481. The Offset Ruling was an interpretive rule, promulgated by the agency when Congress' efforts to amend the Act in 1976 had failed, that set forth conditions under which new sources could be constructed in nonattainment areas, pending further legislation.

[9]The Conference bill adopted the EPA's Offset Ruling, with certain modifications, as the basis for governing new source construction in nonattainment areas prior to July 1, 1979. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, Section 129(a), 91 Stat. 745. Both the general nonattainment area requirements (Section 172 of the Act, 42 U.S.C. (Supp. IV) 7502) and the specific new source review provision

Senate bill, the key term "stationary source" was left undefined. The Conference Committee Report clearly reflects the origin of the new source review provisions:

> All implementation plan revisions must contain a permit program for new or modified major facilities similar to the program required in the House bill.

H.R. Rep. No. 95-564, 95th Cong., 1st Sess. 157 (1977), *reprinted in* 3 *Leg. Hist.* at 537. And respondents point to nothing in the legislative history that supports their claim that the Conference bill precluded the Administrator from approving SIPs employing a plant-wide new source review mechanism. Thus the court of appeals correctly concluded that the legislative history cited by respondents does not support their contention that Congress foreclosed this option.

3. Respondents appear to suggest (Br. in Opp. 4 & n.9) that plantwide new source review permits repeated substantial net increases in the air pollution emissions of a single plant. This contention is doubly unfounded. First, the applicable regulations require aggregation of successive emissions increases over a reasonable time period for the purpose of determining whether any given modification of a major pollution source is subject to new source review. See 40 C.F.R. 51.18(j)(1)(vi)(a) and (b); see also 40 C.F.R. Part 51 App. S II(A)(6) (aggregation over a five-year period under Offset Ruling); 40 C.F.R. 52.24(f)(6) (aggregation over a five-year period under moratorium program).[10] Second,

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(Section 173 of the Act, 42 U.S.C. (Supp. IV) 7503) generally follow the provisions of the House bill.

Respondents appear to suggest (Br. in Opp. 16-17, 19) that because the 1976 Offset Ruling assumed that new source review would occur on a unit-by-unit basis the 1977 Amendments to the Act should be interpreted to require the same. There are two major flaws in this reasoning. First, Congress adopted the Offset Ruling only for the period prior to July 1, 1979. Second, Congress made clear that the Administrator remained free to "modif[y] by rule" the requirements of the Offset Ruling Clean Air Act Amendments of 1977, Section 129(a)(1) (91 Stat. 745).

[10]See also 45 Fed. Reg. 52698, 52701 (1980).

any quarrel that respondents might have with the administrator's particular de minimis threshold amounts is outside the scope of this proceeding. These significance thresholds were established by regulation, 40 C.F.R. 51.18(j)(1)(x), pursuant to the mandate of the court of appeals in *Alabama Power Co.* v. *Costle, supra*, 636 F.2d at 399-400, 405, see 45 Fed. Reg. 52705-52710 (1980), and were not challenged by a timely petition for review. Intelligent evaluation of these threshold significance levels requires understanding of their relative magnitude compared to typical industrial emissions levels.[11] Absent the detailed record compiled for the administrative decision that is considered upon a petition for review any effort to second-guess the agency's expert judgment is impermissible.[12]

4. Respondents argue (Br. in Opp. 24-26) that the expiration of the 1982 deadline fixed by the 1977 Amendments for attainment of air quality standards without attainment having been achieved in many regions of the nation demonstrates the invalidity of the regulations authorizing a plant-wide approach to new source review, and militates against further review. Respondents' argument rests upon several unsupported premises. They seem to assume that use of a plant-wide approach either caused various regions to fail to

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[11]In fact, the threshold significance levels are extremely modest. For instance, the de minimis level for sulfur dioxide is 40 tons per year. 40 C.F.R. 51.18(j)(1)(xiii); 40 C.F.R. 52.24(f)(13). If a thousand plant modifications resulting in additional pollution of a magnitude just below this significance threshold occurred in the entire United States in a year, the aggregate additional emissions could not exceed 40,000 tons per year. By contrast, in 1978 total sulfur dioxide emissions in the United States were 29.7 *million* tons. National Commission on Air Quality, *To Breathe Clean Air* 288 (Table 47) (1981). The additional emissions permissible in this hypothetical would represent an increase of .13% over the preexisting level.

[12]The administrative record makes clear that the agency considered the effect of numerous separate de minimis emissions increases upon air quality in fixing the significance thresholds. 45 Fed. Reg. 52708 (1980).

attain the required degree of air quality improvement or now prevents those regions from achieving that improvement. In fact, there is no reason to believe that there is any association between the source definition in force for new source review purposes in a given region and success or failure in achieving air quality improvement. Only thirty-nine of the 111 nonattainment areas tentatively identified by EPA have ever had in force an EPA-approved plant-wide new source review procedure. The remaining nonattainment areas have remained subject to unit-specific new source review—yet still failed to meet the Act's requirements.[13]

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[13]Respondents' argument also proceeds as though the Administrator's regulations would permit construction of new stationary air pollution sources to proceed as before in areas that did not meet the 1982 deadline. On the contrary, pursuant to Section 110(a)(2)(I), 42 U.S.C. (Supp. IV) 7410(a)(2)(I), the Administrator has proposed to activate the moratorium required by the Act on construction or modification of major sources of air pollutants in areas with excessive concentrations of those pollutants. 48 Fed. Reg. 4972 (1983).

Respondents' quarrel (Br. in Opp. 25 n.55) with EPA's conclusion that a moratorium is required by law is outside the scope of this litigation. In any event, whether or not respondents agree with the agency's position on that score, the Administrator has responded affirmatively to insure that new facility construction cannot exacerbate air quality deficiencies in nonattainment areas.

We note that EPA's position that a moratorium is required rests on a straight-forward reading of the statute. Under the Clean Air Act a construction moratorium must be imposed on areas whose SIPs do not "meet [] the requirements of part D" of the statute. Section 110(a)(2)(I), 42 U.S.C. (Supp. IV) 7410(a)(2)(I). One of those requirements is that the SIP "provide for" attainment by the end of 1982. Section 172(a)(1), 42 U.S.C. (Supp. IV) 7502(a)(1). See 48 Fed. Reg. 4974 (1983).

The applicability of the moratorium to nonattainment areas does not moot this case. As explained in the petition (82-1591 Pet. 6) the regulations in dispute govern the scope of the moratorium as well as new source review. Moreover, for those areas that have secured an extension of the 1982 deadline for meeting air quality standards for ozone and carbon monoxide until 1987, pursuant to Section 172(a)(2) of the Act, 42 U.S.C. (Supp. IV) 7502(a)(2), the question of the scope of new source review continues to be of substantial importance. Of course, if respondents' contention that the statute does not impose a moratorium in the present circumstances were correct, the scope of new source review would be of even greater practical importance.

5. Respondents' argue (Br. in Opp. 23-24) that the question in this case should be left to Congress. But Congress, in enacting the 1977 Clean Air Act Amendments, left the task of defining "stationary source" to the agency—a delegation the court of appeals failed to respect. In any event, there can be no confident prediction that Congress will act one way or another on this point in the near term. Indeed, just like the 94th Congress, which proved unable to produce amendments to the Act in 1976 in the face of a similar nonattainment situation, the 97th Congress proved unable to legislate on this subject in 1982. The Senate bill respondents cite did not see floor action; the House Committee did not even report out a bill. Thus the views expressed in the Senate Report upon which respondents rely (Br. in Opp. 24) do not represent the intentions of the 97th Congress, much less those of the 95th Congress that adopted the provisions in controversy, and provide no basis for allowing the erroneous decision of the court of appeals to stand.

CONCLUSION

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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